

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2014-000184-001 DT

08/25/2015

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT

J. Eaton

Deputy

STATE OF ARIZONA

SETH W PETERSON

v.

GREGORY SCOTT MASON (001)

W CLIFFORD GIRARD JR.

REMAND DESK-LCA-CCC

SCOTTSDALE MUNICIPAL COURT

HIGHER COURT RULING / REMAND

**Lower Court Case Number M-0751-TR-2012-007386.**

Defendant-Appellant Gregory Scott Mason (Defendant) was convicted in Scottsdale Municipal Court of driving under the influence and driving under the extreme influence. On August 8, 2014, this Court issued its Ruling affirming the judgment and sentence imposed. Defendant filed a Petition for Special Action first with the Arizona Court of Appeals and then with the Arizona Supreme Court, which issued the following Order:

Petition for Review to the Supreme Court = GRANTED. The superior court's appellate ruling is vacated and remanded to the superior court for reconsideration in light of State v. Bernstein, 237 Ariz. 226, 349 P.3d 200 (2015).

**I. FACTUAL BACKGROUND.**

On March 26, 2012, Defendant was cited for driving under the influence, A.R.S. § 28-1381(A)(1) & (A)(2); and improper right turn, A.R.S. § 28-751(1). The State later filed an Amended Complaint charging Defendant with driving under the extreme influence, A.R.S. § 28-1382(A)(1) & (A)(2) (0.15 or more and 0.20 or more).

Prior to trial, Defendant's attorney filed an Offer of Proof in Support of Expert Testimony and Anticipated Trial Objections. (R.T. of Sep. 4, 2013, at 43.) The trial court said it would allow testimony about problems gas chromatograph serial number 650N9042003 (instrument number 2003) was having in general, but would not allow testimony about each and every specific problem the instrument had in the past. (*Id.* at 43-44.) Defendant's attorney said he would be selective in the material presented to the jurors. (*Id.* at 45.) The trial court said it would determine what witnesses it would allow based on the testimony presented by other witnesses. (*Id.* at 57-58.)

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Vincent Villena testified he was a forensic scientist for the Scottsdale Crime Laboratory (SCL). (R.T. of Sep. 9, 2013, at 190.) He described testing the sample of Defendant's blood using instrument number 2003. (*Id.* at 196–216, 253.) He noted no problems in the testing of the sample of Defendant's blood. (*Id.* at 206, 219.) He testified the results of his testing showed Defendant had BAC readings of 0.213 and 0.214. (*Id.* at 227.)

After the prosecutor finished direct examination, Defendant's attorney raised the issue of the other witnesses he had subpoenaed from the SCL. (R.T. of Sep. 9, 2013, at 241.) The trial court said it had not made a final determination of which witnesses it would allow, but said it wanted to hear the complete testimony from Mr. Villena and the testimony of Chester Flaxmayer, and then it would make a determination whether to allow the proposed testimony from the other witnesses or preclude that testimony as being cumulative. (*Id.* at 241–44, 245–46, 251–52.) Defendant's attorney agreed to proceed with Mr. Villena and Mr. Flaxmayer. (*Id.* at 247, 251, 252–53.)

On cross-examination, Defendant's attorney questioned Mr. Villena about problems the SCL had over the years with instrument number 2003. (*Id.* at 253–61.) When Defendant's attorney began to question Mr. Villena about specific problems in the past, the prosecutor objected. (*Id.* at 261–62.) The trial court ruled Defendant's attorney could ask Mr. Villena about any specific problems that may have happened in this case. (*Id.* at 263.) As the cross-examination continued, the prosecutor would object each time Defendant's attorney tried to ask about specific problems that had happened at times other than the test run in the present case, and the trial court would remind Defendant's attorney of the ruling it had made. (*Id.* at 264–66, 267–68, 270–73, 274, 277–78, 280–81, 287–88, 289–90.) Once Mr. Villena concluded his testimony, the State rested. (*Id.* at 305.)

Prior to the start of Defendant's case, the trial court stated it would allow any testimony that showed there were inaccuracies in the process of the testing of Defendant's blood sample, but would not allow testimony about problems that did not affect the testing of Defendant's blood sample. (R.T. of Sep. 9, 2013, at 306–07.) It further would not allow testimony from other witnesses that described the same events Mr. Villena discussed because that testimony would be cumulative. (*Id.* at 308–09.) It thus would allow Defendant's attorney to present the testimony of Mr. Richard Bond from the SCL, but would not allow testimony from other members of the SCL because that testimony would be cumulative. (*Id.* at 310–14.)

Defendant then presented the testimony of Chester Flaxmayer, who discussed all the problems he identified with the SCL and with instrument number 2003. (R.T. of Sep. 9, 2013, at 320, 324–49.) Again, when Defendant's attorney attempted to question Mr. Flaxmayer about problems that did not affect the testing of Defendant's blood sample, the prosecutor objected and the trial court sustained the objection. (*Id.* at 327–29, 340, 342–43, 344, 348–49.) On cross-examination, Mr. Flaxmayer acknowledged he had not reviewed any of the paperwork for this particular case, and thus he knew of no problems with the run for the testing of Defendant's blood sample. (*Id.* at 349, 362.)

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After Mr. Flaxmayer's testimony, Defendant's attorney made a motion for judgment of acquittal, which the trial court denied. (R.T. of Sep. 9, 2013, at 385.) Defendant's attorney then presented the testimony of Mr. Richard Bond of the SCL and questioned him about instrument number 2003. (*Id.* at 386–92, 401–03.) Again, when Defendant's attorney attempted to question Mr. Bond about problems that did not affect the testing of Defendant's blood sample, the prosecutor objected and the trial court sustained the objection. (*Id.* at 390–92, 393–94.) After Mr. Bond's testimony, Defendant rested. (*Id.* at 404.)

After hearing arguments for the attorneys and instructions from the trial court, the jurors found Defendant guilty of all DUI charges. (R.T. of Sep. 10, 2013, at 435–37.) The trial court then found Defendant responsible for the civil traffic violation. (*Id.* at 437.) The trial court later imposed sentence. (R.T. of Oct. 8, 2013, at 446–47.) On that same day, Defendant filed a timely notice of appeal. On August 8, 2014, this Court issued its Ruling affirming the judgment and sentence for Defendant. On July 30, 2015, the Arizona Supreme Court remanded this matter for reconsideration in light of *State v. Bernstein*, 237 Ariz. 226, 349 P.3d 200 (2015).

## II. DISCUSSION.

In *State v. Bernstein* (*Herman et al.*), 237 Ariz. 226, 349 P.3d 200 (2015), the Arizona Supreme Court addressed the trial court's role under Rule 702(d) when a party contends an expert has not properly applied generally reliable principles or methods. That case involved 11 defendants charged with aggravated driving under the influence and whose blood samples had been tested by personnel at the Scottsdale Crime Laboratory using instrument number 2003. The court first held the trial court, as part of its gatekeeper role, should assess an expert witness's particular application of a generally reliable methodology rather than leaving that assessment solely to the jurors in determining the weight to give expert testimony. *Bernstein* (*Herman et al.*) at ¶¶ 12–13. It then held that “not all errors in the application of reliable principles or methods will warrant exclusion,” and held instead “[e]rrors in the application of a generally reliable methodology . . . should not serve to exclude evidence unless they are so serious as to render the results themselves unreliable.” *Bernstein* (*Herman et al.*) at ¶¶ 14, 15. The court then applied those principles to the facts of that specific case:

The parties do not dispute that gas chromatography is a reliable methodology for determining BAC and that expert testimony on that topic is relevant and helpful, so the State has met its burden as to Rule 702(a) through (c). Relying on Rule 702(d), defendants argue that their BAC results must be excluded because the instrument's faults establish that the methodology was not reliably applied. The trial court properly considered defendants' challenges as part of its gatekeeping inquiry. But the court applied the wrong legal standard under Rule 702(d) and thereby abused its discretion in excluding the evidence.

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The trial court observed that “[i]nherent in the concept of reliability is confidence,” and that the emails among SCL staff expressing concern about the instrument undermined confidence in its reliability. The emails did not express doubt about the reliability of the results for particular samples, but instead related concerns that the data drops remained unresolved and might become subject to legal challenge. The trial court misapplied Rule 702(d) by concluding that the staff’s general concerns established that the instrument’s methodology had not been reliably applied with respect to the particular BAC results at issue.

The trial court also explained its ruling by noting the data drops, the mislabeling, and the laboratory’s failure to remove the instrument from service. But the fact that the instrument here sometimes failed to produce a reading does not itself imply that the results it did generate were inaccurate. (A different conclusion would result if an instrument did not accurately measure a known standard or failed to produce consistent results for replicate samples within a required range.) And the State presented evidence that incidents of mislabeling could readily be corrected based on the printing sequence, and no evidence suggests that the defendants’ samples were misidentified. The record does not show that the identified errors rendered the results of the defendants’ tests unreliable; instead, as the trial court acknowledged, the State presented evidence supporting the accuracy of those results. As to the defendants’ results, the State met its burden under Rule 702(d) of showing that gas chromatography had been reliably applied to analyze BAC.

This is not to say that the malfunctions or the lab’s failure to resolve them are irrelevant. The jury may consider the instrument’s malfunctioning and the laboratory staff’s related concerns when assessing the weight or credibility of the test results. This conclusion recognizes that “[c]ross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.” Ariz. R. Evid. 702 cmt. (2012).

*Bernstein (Herman et al.)* at ¶¶ 19–22 (citations omitted).

This Court does not read this last paragraph as stating that all evidence relating to a gas chromatograph instrument or testing done on such an instrument is admissible as a matter of law. Instead, whether under its gatekeeping function under Rule 702 or its general obligation under Rule 104(a) to determine the admissibility of evidence, the trial court must still determine whether the evidence is relevant:

Relevant evidence is admissible unless any of the following provides otherwise:

- the United States or Arizona Constitution;
- an applicable statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Irrelevant evidence is not admissible.

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Rule 402, ARIZ. R. EVID. Thus, a party does not have the right to cross-examine a witness by introducing irrelevant evidence. *State v. Cañez*, 202 Ariz. 133, 42 P.3d 564, ¶¶ 62–64 (2002); *State v. Oliver*, 158 Ariz. 22, 30, 760 P.2d 1071, 1079 (1988); *State v. Buccheri-Biance*, 233 Ariz. 324, 312 P.3d 123, ¶¶ 8–11 (Ct. App. 2013). Relevant evidence is defined as follows:

Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.

Rule 401, ARIZ. R. EVID.

In the present matter, the trial court concluded Defendant’s proposed cross-examination was not relevant, thus the trial court did not abuse its discretion in precluding that evidence. In this case, “the fact [that was] of consequence in determining the action” was Defendant’s blood alcohol content, which the State’s witness said was 0.213 or 0.214. The only evidence that would have had “any tendency to make [that] fact . . . less probable than it would be without the evidence” would have been evidence that showed either (1) the sample tested was not the blood sample taken from Defendant, or (2) instrument number 2003 did not accurately measure the blood alcohol content of that sample. Although there was evidence that instrument number 2003 had mislabeled other samples, there was no evidence that instrument number 2003 had mislabeled the sample of Defendant’s blood, and more importantly, there was no evidence that the mislabeling of other samples made it any more likely that instrument number 2003 had mislabeled the sample of Defendant’s blood. Similarly, there was no evidence that the results of 0.213 or 0.214 were inaccurate, and no evidence that any of the other results given by instrument number 2003 in other tests were inaccurate. It would have been a different situation if any of the witnesses had said that the errors in other specific tests made it probable or even possible that instrument number 2003 did not accurately identify the sample as the one taken from Defendant or did not accurately measure the blood alcohol content of that sample. In such a case if there were some stated connection between the other tests and the testing of Defendant’s blood sample, the jurors would have been entitled to receive that evidence and consider it in assessing the weight or credibility of the test results. But because there was no evidence that connected the other tests with the testing of Defendant’s blood sample, any consideration the jurors might have given to that other evidence in assessing the weight or credibility of Defendant’s test results would have been based on nothing more than pure speculation and therefore precluded under Rule 402.

### III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court properly ruled Defendant’s proposed cross-examination was not relevant and thus did not abuse its discretion in precluding that cross-examination.

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**IT IS THEREFORE ORDERED** affirming the judgment and sentence of the Scottsdale Municipal Court.

**IT IS FURTHER ORDERED** remanding this matter to the Scottsdale Municipal Court for all further appropriate proceedings.

**IT IS FURTHER ORDERED** signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen

THE HON. CRANE MCCLENNEN  
JUDGE OF THE SUPERIOR COURT

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